No. 57 and 61.

Brf. of Yeaman for Appt. et al.

Office Supreme Court, U. S.
FILED
OCT 1 1898
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1897.

Filed Oct. 1, 1898.

No. 57

THE HOME FOR INCURABLES,

Appellant,

vs.

MARY SPENCER NOBLE ET AL.

No. 61

EMELINE COLVILLE,

Appellant,

vs.

THE AMERICAN SECURITY AND TRUST COMPANY.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT THE HOME FOR INCURABLES.

GEO. H. YEAMAN,
J. S. FLANNERY,
GEO. C. KOBBE,
Of Counsel.

THE EVENING POST JOB PRINTING HOUSE, N. Y.

IN THE

Supreme Court of the United States.

October Term, 1897.

THE HOME FOR INCURABLES, Appellant,

v.

MARY SPENCER NOBLE *et al.*

No. 304.

AND

EMELINE COLVILLE *et al.*, Appellants,

v.

THE AMERICAN SECURITY AND TRUST COMPANY, a corporation, and THE HOME FOR INCURABLES.

No. 309.

BRIEF FOR APPELLANT, THE HOME FOR INCURABLES OF NEW YORK.

This is an appeal from the decree of the Court of Appeals of the District of Columbia, reversing the decree of the Supreme Court of the District of Columbia, construing the last will and testament of Mary E. Ruth and the codicil thereto.

Statement of the Facts.

The will of the testatrix, bearing date June 1, 1892 (7), left her entire estate to the appellee, the American Security and Trust Company, for the erection of a trust, the purposes and limitation of which are not material to the question here discussed, further than that the trust terminated, in any event, at the death of the granddaughter of the testatrix, Sophia Y. Huston, the beneficiary in the trust.

By the third clause of her will (8), the testatrix directs that at the termination of said trust the appellee, the American Security and Trust Company, her executor and trustee, shall "convey and deliver over" $5,000 of her estate to the *Hospital of the University of Pennsylvania*, to be used by said hospital "to endow and forever maintain a first-class perpetual bed in said hospital, in the City of Philadelphia, said bed to be in the name of my beloved son Melancthon Lore Ruth."

By the same clause, she gives the "residue and remainder" of her estate to the appellant, the *Home for Incurables* at Fordham, New York City, to be used by it "to endow and forever maintain *one or more beds* in said home, in the name and memory of my beloved son Melancthon Lore Ruth."

Then follows the appointment of guardians of the person of her granddaughter, Sophia Y. Huston, and the appointment of the appellee, the American Security and Trust Company, as her executor.

By a codicil, made on the same day, June 1, 1892, testatrix says, "I hereby revoke and annul the *bequest* therein made by me to the *Home for Incurables* at Fordham, New York City, in the State of New York, and I hereby *give and bequeath the five thousand dollars* (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville, the widow of Samuel Colville, now living in New York City, said *bequest*

being on account of her kindness to my son and myself during his and my illness and my distress" (9).

There being in these three provisions an apparent ambiguity and inconsistency, the appellee, the American Security and Trust Company, filed a bill in equity to obtain a construction of the will and codicil, and for directions to the executor how to administer the estate. By his decree (29), Mr. Justice Cox, of the Supreme Court of the District of Columbia, sustained the contention of the appellant, the Home for Incurables, and held that "the legal effect of the codicil executed by the testatrix, Mary Eleanor Ruth, on the 1st day of June, 1892, to her will of the same date, as shown in the proceedings, was to revoke the legacy of five thousand dollars given in and by said will to the Hospital of the University of Pennsylvania and to substitute Mrs. Emeline Colville as the legatee of said sum of five thousand dollars in the place and stead of said Hospital of the University of Pennsylvania, but not to revoke the residuary bequest in said will contained in favor of the Home for Incurables at Fordham, in New York City" (29). No evidence was taken in the cause, and the whole case was presented as a question of law arising under the will and codicil.

Assignment of Errors.

The Court of Appeals of the District of Columbia erred:

I.—In directing the Supreme Court of the District of Columbia to vacate its decree theretofore entered herein and to enter a decree in conformity with the opinion of said Court of Appeals of the District of Columbia.

II.—In holding the true legal intent and meaning of the will and codicil of Mary Eleanor Ruth to be that the bequest of five thousand dollars to the Hos-

pital of the University of Pennsylvania remained intact and unaffected by the codicil.

III.—In holding that the bequest of the rest and residue of the estate to the Home for Incurables at Fordham, in the City of New York, was revoked by said codicil.

IV.—In holding that out of the said rest and residue there was bequeathed to Mrs. Emeline Colville the sum of five thousand dollars.

V.—In holding that the remainder of the estate is distributable to the next of kin of Mrs. Ruth in accordance with the provisions of the statute of distributions.

VI.—In not holding that the true intent and meaning of the testatrix, Mary E. Ruth, as expressed in her said will and codicil, and that therefore the legal construction and effect of said will and codicil, is to give, devise and bequeath her residuary estate to the Home for Incurables at Fordham, New York.

POINTS AND AUTHORITIES.

I.

The construction placed upon the codicil by the decree of the Supreme Court of the District is a reasonable and proper one, and is in accord with the evident intention of the testatrix.

It is often said that the primary rule for the construction of wills is to ascertain and carry into effect the intent of the testator. This is certainly true, and yet it is a rule which, taken by itself, is very often of little or no assistance. It

may be said that the intent *is the will*, provided the will be executed with the formalities required by law, and within the scope and effect allowed by law for testamentary disposition. Therefore, in searching for that intent, resort must usually be had to other rules of construction.

Of the rules most applicable to the case in hand are: (1) To find the intent, if possible, within the four corners of the will; (2) to give the will such construction, if possible, that all its provisions may have effect, and (3) if this be not practicable, in the literal terms of the will, then those provisions must fail, the rejection of which, for inconsistency, would do the least violence to the *general scheme* of the will.

Every will must be construed in the light not merely of its special provisions, but to preserve and give effect to the intention of the testator. What was the intention of the testatrix here, as evidenced by the language of her will? It was plainly her purpose to provide for her granddaughter as long as she might live, and at the latter's death, which had occurred before the bill was filed, to have her estate *go for the perpetuation of the memory of her deceased son.* This, undoubtedly, was the end she had in view, and the scheme of disposition outlined in the will was the means taken to accomplish that end.

We have in this will a scheme—a trust for life, income to life tenant, and at her death, or the sooner termination provided for the trust, remainder to two institutions, the bequest of $5,000 to one, the Hospital of the University of Pennsylvania, and the total residue and remainder to the *Home for Incurables.* So far, there is not a particle of doubt. There is the clear intent to dispose of the whole estate. No question of intestacy could arise, nor could there be any question as to the proportions in which the two institutions are to take. One is to take a definite sum, the other to have all that remains.

The doubt arises touching the intent and effect of the codicil. It revokes "the *bequest* therein made to the Home for Incurables," and gives "*the* five thousand dollars (heretofore in my will bequeathed to the Home for Incurables) to my friend Mrs. Colville."

There is no bequest of $5,000 to the Home for Incurables. There is a bequest of $5,000 to another legatee, the Hospital of the University of Pennsylvania. In the codicil, the testatrix was dealing with a *definite sum*, the sum of $5,000, which was given to one legatee in the will and which is taken away by the codicil and given to another legatee. Mrs. Colville is not made the residuary legatee. The residuary clause is not interfered with. The amount of that residuary bequest may be more and may be less than $5,000. But the testatrix deals with an *exact sum*, and expresses the intention to revoke the bequest of *that sum* to one legatee, and to "give *the* five thousand dollars" to another legatee. The particular sum given is identified by reference to *the same sum* "heretofore" given to another legatee. The mind of the testatrix was clear on that point. She, or the attorney who drew the codicil, confused the application of her intention by mistaking, not the *sum* given to, but the *name* of, the previous legatee. It seems to be a clear case of mistake on the part of the scrivener, in writing "Home for Incurables" instead of "Hospital of the University of Pennsylvania," and a failure of the testatrix to observe the mistake before signing. The codicil speaks of a legacy of $5,000. That much is arithmetically certain. The will had given it to the Hospital of the University of Pennsylvania. When the codicil speaks of it as a legacy given by the will to the Home for Incurables, it is infinitely more reasonable to infer that the testatrix or her attorney made a mistake of name than that she intended to cut off the Home entirely from a residuary bequest and *devise*, the amount of which was not named, and could not have been named.

The construction of this will contended for by the Home for Incurables, and adopted by the Supreme Court of the district, is not only founded upon the soundest principles of common sense, but is sustained by all the authorities.

The rule that a later provision in a will controls an earlier provision, upon the ground that it is the last expression of testamentary intent, is one of convenience only. It is not rigid, but yields to the general intent—to the scheme of the will.

Where a bequest is made in clear and unambiguous terms, it would be against every principle of construction to permit such a gift to be revoked by doubtful expressions in a codicil. As a general rule, it is said, that in order to revoke a clear devise, the intention to revoke must be as clear as the devise.

Williams' Ex'rs (6th Am. Ed.), 220.
Boseley *v.* Boseley, 14 How., 395.
Johns Hopkins Universty *v.* Pinckney, 55 Md., 363.

In giving construction to a will, all parts of it should be examined and compared, and the intention of the testator must be ascertained not from a part, but from the whole of the instrument.

Lane *v.* Vick *et al.*, 3 How, 464.

Where there are two intents expressed in a will the primary must control the secondary—the general, the particular.

Smith *v.* Bell, 6 Peters, 84.
Simpers *v.* Simpers, 15 Md., 180.
Taylor *v.* Watson, 35 Md., 519.
Jones *v.* Earle, 1 Gill., 395.

The clear general intent of this will was to provide for the granddaughter of the testatrix as long as she might live, and, upon her death, to perpetuate the memory of the testatrix's deceased son. The particular intent expressed in the codicil is to give

a pecuniary legacy to a friend—Mrs. Colville. This particular intent must be controlled by the clear general intent of the will. The names of two charitable institutions were accidentally and inadvertently confused, not exactly transposed, but one name written where the other was intended to be written. Any other view results in holding that the testatrix, in making her codicil, and giving to a "dear friend," overlooked in the will, a definite sum therein otherwise disposed of, did, by her codicil, change the whole scheme of her will, and deliberately concluded to die intestate as to the greater part of her estate. The will is entirely clear. The codicil, taken literally, has no meaning, and therefore will not be allowed to override and subvert the will.

The general intention of the testator, although first expressed, will overrule a particular intent.

Pue *v.* Pue, 1 Md. Ch., 382.
Chase *v.* Lockerman, 11 Gill & J., 186.

This latter construction is especially favored when the *posterior* paper is a *codicil* and is inadequate to the disposition of the *entire* property, so that the consequence of rejecting the prior document, the will, would be to produce partial intestacy.

1 Jarman on Wills (5th Ed., 175).

"Numerous are the questions which have arisen in regard to the extent to which a codicil affects the disposition of a will or antecedent codicil, and which are commonly occasioned by the person framing the codicil not having an accurate knowledge or recollection of the contents of the prior testamentary paper.

"In dealing with such cases it is an established rule not to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil."

1 Jarman on Wills (5th Ed.), p. 176, and cases cited in note 2.
Pue *v.* Pue, *supra.*

"The disposition of a will will not be disturbed by an erroneous recital of its contents in a codicil,

unless a design to revoke or modify the disposition in the will can be fairly collected from the whole instrument.

"Thus, where a testator [Skerratt *v.* Oakley, 7 T. R., 492], after bequeathing certain legacies to his wife, devised to her for her life certain leasehold premises at *Northwood*, and he gave his leasehold estate at Wrentnall, and his estate at Northwood, after his wife's death, and the residue of his estate to other persons. In a codicil *executed on the same day* he directed that the bequest to his wife in his will should be in full of all her claims on his estate, except the estate for life of his 'wife and her assigns in the premises at Wrentnall, anything in the foregoing will to the contrary notwithstanding.' It was contended that the widow was entitled to the *Wrentnall* estate, under her husband's codicil, it being manifest by the concluding clause that he intended to give her something to which she had no right by the will; but the Court decided against the widow's claim. *Lord Kenyon said that the intention must be collected from the will and codicil taken together, and it was impossible not to see that the word 'Wrentnall' was written in the codicil instead of the word 'Northwood.'*

1 Jarman on Wills (5th Ed.), 530.

It has often been said that no two wills, or will cases, are exactly alike, and that each must be considered upon its own facts. The case just cited is probably more like the case at bar than any other to be be found in the books.

II.

To adopt either of the theories of construction contended for by the respective counsel for the Hospital of the University and the heirs of Mrs. Ruth, or the one adopted by the prevailing opinion of the Court of Appeals, would be to make a new and different will for the testatrix.

1.

The Hospital of the University of Pennsylvania contends that the legacy given to it by the will was not intended to be revoked by the codicil. Mrs. Colville and the heirs necessarily concede this claim in order to lay a foundation for their own theories of construction.

We have endeavored to show in the first part of this brief that it was the intention of the testatrix to revoke the legacy of $5,000 given to the hospital and to give it to her friend Mrs. Colville, but that the attorney who drew the codicil confused the names of the two institutions, and substituted "Home for Incurables" for "Hospital of the University of Pennsylvania." The testatrix feeling, no doubt, that she had sufficiently carried out her intention of perpetuating the memory of her son by making the Home for Incurables a charitable institution, her residuary legatee, instructed her attorney to revoke the legacy of a specific sum which she had given to another charitable institution—the Hospital of the University of Pennsylvania—and leave it to a friend, Mrs. Colville. It was undoubtedly the intention of the testatrix to give Mrs. Colville the sum of $5,000; not $5,000 of the residuum which had been left to the Home for Incurables, but the identical $5,000 which had been given by her will to another. There was only one such bequest mentioned in the will—the legacy to the hospital, and if Mrs. Colville should receive that, then the hospital should take nothing.

2.

On behalf of Mrs. Colville, it is urged that it was the intention of the testatrix to give $5,000 to the Hospital of the University of Pennsylvania, and to leave the whole of the residuum to her. Such a construction is not only at variance with the express words of the codicil but it is con-

trary to the plain intention of the testatrix, which was to perpetuate the memory of her son Would the testatrix have caried out her intention of founding a memorial to her son if she had left a small legacy to a single charitable institution and given the bulk of her estate to a friend, at whose death it would go to strangers?

Aside from the unreasonableness of such a theory upon its face, we have positive evidence in the wording of the will and codicil to show that the codicil was not designed to pass more than a *mere legacy*. At the time of the making of the will the testatrix's estate consisted of both real and personal property. In her will, after making provision for the gift of $5,000 to the hospital, she says, "*I give, devise, and bequeath*" the residue and remainder, making use of the legal expression for the testamentary disposition of real and personal property. In the codicil, however, she employs words carrying personal property alone, and says, "I hereby revoke and annul the *bequest*" and "I hereby *give* and *bequeath* the five thousand dollars," &c.

Bouvier defines "bequest" to be: "A gift by last will or testament; a legacy. This word is sometimes, though improperly, used as synonymous with devise. There is, however, a distinction between them. A *bequest* is applied more properly to a *gift by will of a legacy*, that is, of personal property; *devise* is properly a *gift by testament of real property*."

This will was not drawn by a testatrix ignorant of legal phraseology; but was drafted by a lawyer skilled in the use of technical language and understanding the legal signification of the words employed. Had the attorney who drew this codicil really intended it to carry the whole residuary estate of the testatrix, he would have employed language broad enough to embrace both real and personal property. It is perfectly plain from the wording of these two papers that it was the intention of the attorney who drew them to revoke by

the codicil a mere "*bequest*"—a *legacy*—and to "bequeath" that same legacy to another.

If nothing but a *legacy* was revoked, Mrs. Colville takes nothing but a *legacy*, and her claim to the residuum falls to the ground.

3.

The heirs insist that the testatrix intended to give $5,000 to the hospital, $5,000 to Mrs. Colville, and that she died intestate as to the remainder of her estate. This is incredible upon its face. We are asked to assume that the testatrix intended to provide a life estate for her granddaughter; and, upon the death of the latter, carve two pecuniary legacies out of her estate and die intestate as to the bulk of her property. An inspection of the will and codicil will show the fallacy of such a contention. The second clause of the will says: "I give, devise, and bequeath *all of my estate*, real, personal, or mixed, whether in possession, reversion, or remainder, now acquired or hereafter to be acquired"—thus showing an intention to dispose of *all* of her property. In the codicil she says: "I hereby revoke and annul the *bequest* therein made," and "I hereby give and *bequeath*," &c. The testatrix does not revoke a *devise* of *realty*, but merely a *gift* of *personalty*. Nothing whatever is said in the codicil about revoking the disposition of the residuum or about bequeathing and devising that residuum to another. The bequest of a *legacy of* $5,000 is revoked and given to some one else. *The gift of the residuum to the Home for Incurables has not been touched.*

The legal terms of the will and codicil show that it was not the intention of the draftsman to have the testatrix die intestate as to any portion of her estate. As he was carrying out her instructions, his intention must be taken as an expression of her will. The testatrix has nowhere in her will indicated that she desired any of her property to go to her heirs generally or to her collateral kindred.

Her whole purpose indubitably was to remember her own flesh and blood—living and dead.

The theories of interpretation here controverted are untenable because they are based upon a mere slip of the pen—instead of resting upon the more substantial foundation of *testamentary intent;* and counsel for the Home for Incurables feel that they can safely rest their client's cause upon the lucid and very able dissenting opinion of Mr. Chief Justice Alvey (44–46).

It is respectfully submitted that the decree of the Court of Appeals should be reversed.

GEO. H. YEAMAN,
J. S. FLANNERY,
GEO. C. KOBBÉ,
Of Counsel for Home for Incurables.

In the Supreme Court of the United States.

EMELINE COLVILLE,
v.
THE AMERICAN SECURITY AND TRUST COMPANY, *et al.* } No. 61.

Brief in behalf of plaintiff in error, Emeline Colville.

STATEMENT.

This is an appeal from a decision of the Court of Appeals of the District of Columbia, construing the will and codicil thereto, of Mary Eleanor Ruth.

A bill for the construction of the will in question was filed on October 2, 1898, on the Equity side of the Supreme Court of the District of Columbia (Record p. 2), and a decree was passed in said cause in which it was adjudged that the legal effect of the codicil, which is the portion of the instrument requiring construction, was to revoke the legacy of five thousand dollars given in and by said will to the Hospital of the University of Pennsylvania (see Will. Exhibit A, Rec. pp. 6-9) and to substitute Mrs. Emeline Colville as the legatee of said sum of five thousand dollars in the place and stead of said Hospital of the University of Pennsylvia, but not to revoke the residuary bequest in said will contained in favor of the Home for Incurables at Fordham, in New York City (Record p. 29).

The learned Court of Appeals for the District of Columbia reviewiug the finding of the court below, arrived at a radically different conclusion, and held that:

"It is the true legal intent and meaning of the will and codicil that the bequest of five thousand dollars to the Hospital of the University of Pennsylvania remains intact and unaffected by the codocil; that the bequest of the rest and residue of the estate to the Home for Incurables at Fordham in the City of New York, was and is revoked by the codicil; that out of this rest and residue there is bequeathed to Mrs. Emeline Colville the sum of five thousand dollars; and that the remainder of the estate is distributable to the next of kin in accordance with the provisions of the statute of distributions." (Record p. 44).

A dissenting opinion on the part of the learned Chief Justice of the Court of Appeals to the effect that the decree appealed from should be affirmed (Record pp. 44-47) only emphasizes this apogee and perigee of judicial opinion, and in one sense, it may fairly be said that "Honors are easy."

The Will proper, which is dated June 1, 1892, disposed of all the estate—real, personal and mixed—to the American Security and Trust Company, in trust, to invest and reinvest the proceeds of the estate in certain described securities, with directions as to the time and manner of the distribution of the proceeds, and further provides that in the event of the death of testator's legatee, or the happening of another contingency, the trust created by the will should cease and determine, and thereupon a bequest of $5,000 should become due and payable to the Hospital of the University of Pennsylvania, and all the rest and residue of the said estate should go to the Home for Incurables at Fordham, New York City. (Record, pp. 7-9).

On the same day a codicil was executed by the testatrix which very materially altered the distribution of her estate,

and which has given rise to the present controversy. Being short it is set out here in extenso:

"I, Mary Eleanor Ruth, being of sound and disposing mind and memory and understanding, do make and publish this codicil to my last will and testament: I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York City, in the State of New York, and I hereby give and bequeath the five thousand dollars (heretofore bequeathed in my will to said Home for Incurables) to my friend Emeline Colville, the widow of Samuel Colville, now living in New York City, said bequest being on account of her kindness to my son and myself during his and my illness and my distress.

"In witness whereof I have hereunto affixed my name this first day of June, in the year of our Lord eighteen hundred and ninety-two, and I in all other things ratify and affirm my said will.

MARY E. RUTH."

To the bill seeking a construction of the above will and codicil answers were filed, which need not be here noticed, except to say that the answer of Emeline Colville alleged as matter of law a plain intention on the part of the testatrix to dispose of her whole property, a carrying out of that intention by the will and codicil, a revocation of the bequest of the rest and residue of the property to the Home for Incurables, and the disposition of said rest and residue to the said Colville; with said answer is coupled a demurer setting up that the heirs at law are not and can not be proper parties to the suit for the reason that the testatrix by her will and codicil made a complete disposition of all her property and purposely bequeathed all her property away from her heirs at law and next of kin. (Rec. pp. 15-17.)

Due proceedings were thereupon had, resulting in the decree of the Equity Court (Rec. p. 29), and the opinion and decree of the Court of Appeals (Rec. pp. 36-44.)

ASSIGNMENT OF ERRORS.

1. The Court erred in overruling the demurrer of Emeline Colville.

2. The Court erred in holding that the testatrix failed to carry out her intention of dying testate as to all of her property.

3. The Court erred in holding that the property bequeathed by the will to the Home for Incurables, and revoked by the codicil, did not go to the appelant, Emeline Colville, by said codicil.

4. The Court erred in denying to the testatrix testamentary liberty.

ARGUMENT.

1. The demurrer of the appellant, Colville, should have been sustained.

The claims of the devisees under the various possible constructions of the will and codicil, if joined, would represent unity, and consequently the testatrix would be testate as to all her property.

While ambigious gifts in wills are treated with scant courtesy by the English courts, on the principle that an unambigious disposition is necessary to defeat the title of the heir at law, next or kin, residuary devisee, or legatee, or person entitled in default of appointment, yet conflicting claimants under a will are entitled to join their claims and ask for a declaration of intestacy as against the heir or next of kin without seeking a construction as between themselves. Forrester, In Re Jervis against Forrester, 13 times, Law Rep. 555. In this case the Forrester trustees and the Attorney General joined forces against the next of kin, and successfully contended that there was a general dedication to charity and no intestacy.

In the case at bar the moving cause of the bequests in the will to the University of Pennsylvania and the Home for Incurables in and by which all of the testatrix's property was disposed of, was commemoration of the memory of her son Melancthon Love Ruth [Rec. p. 8]. In the codicil the moving cause for an alteration in the pathway of distribution of a portion of the property, to wit: the rest and residue was commemoration of her son's memory and gratitude for ministrations bestowed upon that son, and the testatrix, in a time of distress and illness [Rec. p. 9].

So that we have a general dedication to charity and gratitude, a fixed intention to die testate, and no intestacy.

Assignments two, three and four will be considered together.

It is desired first to note that while it is respectfully submitted ample warrant may be found in English cases to sustain the contention of complete testacy herein made, yet, because of the striking differences between the English and American law of wills, the English authorities should only be resorted to when the American authorities have failed to furnish a solution.

Digressing for a moment, the distinction between the American and English law on the subject of Maritime law is just as marked as as in the law of wills. As for instance: A vessel in charge of a pilot whose employment is made compulsory by the laws of the port to which she has sailed, is held liable by the Supreme Court of the United States in case of a collision the vessel being in fault. In England a contrary result is reached, even apart from exonerating statutes because the maritime law has shown a tendency to assimilate common law doctrines, under the influence of a Court of Appeal largely composed of common law lawyers.

Returning to the law of wills, it is an ordinary rule of American law that a devise of an interest without any indication of the extent of the interest devised gives only a life

estate, but if there can be gathered from expressions in other parts of the will, evidence that, by the language of the devise a fee simple was intended to pass, *the Court will give effect to that intention.*

The English courts do not follow the latter branch of the above rule, because of their policy to keep the estate together under their law of primogeniture.

They consequently decline to construe a will so as to take the inheritance from the heir, except upon plain expression of intent in apt terms in the particular instance ; *but the policy of the American law is to find and execute the intention of the testator*, so that American courts are not called upon to watch with brooding care over the heir.

But even eminent English jurists, impelled as they were by environment, inclination, and law, to uphold and maintain the inheriiance of the heir, have used the following language:

"However capricious or harsh or even cruel his testamentary act may be thought to be; however hard it may be upon the interest of those whom the feelings of man, and almost the ordinances of God, require should be provided for, nevertheless the law gives him this liberty and his will must prevail. To do otherwise would be, in the view of our law, to make a man's will for him, and not allow him to make it himself. Besides disinheriting his children, he is at liberty to make his will the medium of displaying his vanity, of gratifying grudges, indulging in idle caprice, and fooling the world to the top of his bent, provided only and always he is not lacking in mental capacity, and observes certain forms in the publication of his testamentary purposes."

It is respectfully submitted that the issue in this case is much broader than the mere question of whether or not certain heirs of the testatrix shall receive their proportionate part of her estate, or whether the entire estate shall be considered to have been devised. The real question is whether

the testatrix shall be permitted testamentary liberty, or whether the law shall arbitrarily step in and write a will for her.

The points raised will appear more clearly if we take a brief historical view of the rise and progress of the law of wills.

We may assume that a primiative state of society at one time existed where, property vesting by common consent in the individual under the right of occupancy, yet that right only continued in the occupier while he lived. Out of the strife and confusion begotten by such a state a system was evolved by which the title of a dead proprietor descended at once.

As the progress of individual ownership and succession has fundamental ideas of primative estate, contrasted with occupancy for a life time, it is safe to assert devolution of property took the following course:

1 Appropriation by Government, that is to say, by the strongest of the survivors surrounding the deceased.

2 Promulgation of a general scheme by that Government in obedience to the profound conviction of the individuals, whereby the inheritance vested in the member or members of the decedent's family.

3. Recognition of a right in the individual owner to dispose of the title at his own choice, and in variance, if need be, of the usual rules of inheritance.

In this last recognition by society lies the sanction of a will; and this sanction reaches its refinement when we find the dead proprietor's wishes so far respected by the Government, and by his fellow men, that he may safely disinherit or transmit it to strangers, or provide for the default of his own kindred, or bestow at pleasure upon selected objects of charity by the formal declaration of his last wishes to that effect.

Until comparatively modern times one's testamentary right of disposition remained obstructed by certain arbitrary rules of distribution, now obselete.

Upon the property of every one who dies it may be said that one or another of two schemes of legal disposition obtains:

1. There is the will of the State; or, as the formal phrase goes, the will which the law draws up.

2. There is the will which the individual has made up himself.

In the former consists the expressions of the public, the legislation, presenting what the State deems the vital scheme; in the latter that which the owner has designed to suit his special circumstances, and which admit of the widest variety of forms. It sometimes happens that the individual scheme as set forth coincides with that of the State; but more commonly the individual scheme seeks to work out a total disposition of its own, differing from that of the State.

Where does the will of the State continue paramount to that of an individual? Or, in other words, what restrictions does public policy place upon one's power of testamentary disposition?

1. Wherever the individual, because of unsound mind, intoxication, or some special subjection in his surroundings to fraud and undue influence must be decreed incapable of making the will.

2. Where the formalities required by law in the execution of wills are not complied with.

3. Where a revocation has been made by the individual directly or by circumstances, and no subsequent disposition has been made.

4. Where on grounds of public policy it is thought unjust to permit the provisions of a will to stand.

5. Where statutory protection is extended to the widow or the husband granting the right of renunciation.

6 Where children are not specifically and intentionally omitted or disinherited, public policy decrees intestacy as to them and the will drawn up by the law operates for their benefit.

7. Where perpetuity is sought to be established, or the free circulation of property is fettered unreasonably long.

8. Where illegal purposes are sought to be accomplished.

9. Where persons incapable of taking are named as legatees.

10. Where provisions are hopelessly vague and uncertain.

The principle objections urged to the liberty of arbitrary wills are: That it is contrary to the laws of nature. that it is an inovation and entire subjection of that course of equal succession which positive law has established in the case of intestatcy, that it breeds family disensions, that it encour ages frauds, and jeopardizes seriously public interests. While these objections are grave and deserving of careful consideration it is confidently asserted they do not furnish sufficient reasons for interfering with the full liberty of testamentary disposition obtaining under American law.

To say that this liberty is against the law of nature because it permits a father to disinherit a child, with or without good cause is an error; and the error consists in considering that children have by the law of nature a vested right in the parent's property made vacant by his death, an error which flows from the mistaken notion that the institution of property rests on any natural right of man as a human being; the same argument applies with equal or even greater force to the proprietor's collateral relations.

Bearing in mind that under the law of nature the nature of property is subsistance, that the mode of acquiring property is by occupancy which can only last while the body lasts, that the transfer of property requires the consent of the proprietor which can of course be expressed only while he lives, the conclusion is irresistable that by the natural

law the death of a proprietor does not, in and of itself, operate to transfer his property to any other person, but, on the contrary, the property must either revert to the common stock or be left vacant to become the spoil of the strongest.

A plausible and strong argument against arbitrary wills is that principles of conscience and equity which seek the dictates of the law of nature, are recognized by and made a part of the Statute regulating the intestate's succession. The sufficient answer is that laws of inheritance are not designed or intended as favors bestowed upon a man's children or kindred for their own benefit; like all other laws of property they rest upon the foundation of general utility and the common advantage.

The fact that in some individual cases such a liberty may be abused, is not a good reason for denying the liberty provided the experience of society has shown that general liberty, though liable to abuse in particular cases is better for the general good than to restrain the liberty.

Granting that a father is guilty of cruel and unconscionable conduct who without cause wills property away from his children and kindred, how can the legislature or judicial construction prevent these faults without creating more mischief and general inconvenience than is sought to be remedied

In the case of Eyre *v.* Jacob, 14 Gratt. in sustaining the Constitutional validity of a Collateral Inheritance Tax Act, the judge who delivered the opinion of the Court of Appeals of Virginia broadly declared: "The right to take property by devise or descent is the creature of law and secured and protected by its authority. The legislature may, if it see proper, restrict the succession to a decedent's estate, either by devise or descent to a particular class of his kindred, or to his lineal descendants and ascendants, it might impose terms and conditions upon which collateral relations may be permitted to take it; or it may, to-morrow, if it pleases, abso-

lutely repeal the statute of wills and that of descent and distribution, and declare that upon the death of a party, his property shall be applied to the payment of his debts, and the residue appropriated to public uses."

In Brettum *v.* Fox, 100 Mass. 234, the Court say: "The power to dispose of property by will is neither a natural nor a constitutional right, but depends wholly upon statute, and may be conferred, taken away or limited and regulated in whole or in part by the legislature."

It is obvious, if the language of the writers and judges referred to be taken without restriction that as against the legislative power of the State the right of the owner of the property, though held in fee or absolute ownership, would be little if anything more than an estate for life, since the State by denying the right of the owner to transmit, could appropriate the property to its own use, thereby constituting itself the universal successor, and could make this policy effectual by prohibiting gifts, deeds or donations which contravened it. It may be confidently asserted, however, that the legislature while having power to regulate the right of succession can not deny it by enactments which are not intended as regulations of the right, or measures of reasonable and equal taxation to raise revenue for public uses, but which are confiscatory in their nature.

Turning to reported decisions we find the following propositions settled, and well settled, by the Supreme Court of the United States and the courts of last resort of the various States:

That cases on wills may guide us to general rules of construction, but unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, *who may always look upon the*

intention of the testator in the particular case as the pole star to direct them in the construction of wills.

Smith *v.* Bell, 6 Pet. 68.
Colton *v.* Colton, 127 U. S. 300.
Hardenburg *v.* Ray, 151 U. S. 112.

That the construction put upon the words of one will does not necessarily furnish a rule for construing the same words in another will, nor does it necessarily furnish a settled and fixed rule of construction which ought to be respected. White such a principle ought not to be totally disregarded it should never be carried so far as to defeat the plain intent of the testator, if that intent may be carried into execution without violating the rules of law:

Colton *v.* Colton, 127 U. S. 300.

That the court must give such a construction as to support the intent of the testator even against grammatscal rules; and to effectuate his evident intention, words and limitations may be transposed, rejected or supplied.

Daniel *v.* Whartenby, 18 Wall. 636.
Pond *v.* Berg, 10 Paige 140.
Appeal of Merkel, 109 Pa. 235.
Terry's Appeal, 102 Pa. 235.
Graham *v.* Graham, 23 W. Va., 36.
Estate of Wood, 36 Cal. 75.
Hammond *v.* Ridgley, 5 H. and J. 245.

That the law prefers a construction which will prevent a partial intestacy to one that will permit it, if such a construction may reasonably be given.

Patch *v.* White, 117 U. S 210.
Lee *v.* Simpson, 134 U S. 572.
Hardenburg *v.* Ray, 151 U. S. 112.

That where the attempt to make a complete disposition of all the testator's property is manifest, its provisions should

be so construed, if they reasonably may be to carry into effect his general intent.

Given *v* Hilton, 95 U. S. 591.

That it is well settled by the authorities that when one undertakes to make a will it will be presumed that his purpose is to dispose of his entire estate; and that when the words of a will fairly carry the whole estate of which he dies seized and possessed, there is no presumption of an intention to die intestate as to any part of his estate.

Hardenburg *v.* Ray, 151 U. S.
Johnson *v.* Trust Company, 79 Md. 18.

That it is the duty of the court to make a will effective if possible.

Bradley *v.* Packet Co., 13 Pet. 89.
Lycan *v.* Miller, 112 Mo. 548.
Bonard's Will, 16 Abb. Pr. N. S. 202.
Bosley *v.* Bosley's Exrs., 14 How. 390.
Burwell *v.* Executors, 2 How. 560.
Weidman's Appeal, 42 Leg. Int. 338.

That whilst no bill in Equity lies to reform a will because its author is dead and his intent can only be known from the language he has used, yet a careful study of that language will generally disclose any inadvertance or mistake in the description of persons or things and the manner in which it should be corrected.

Colton *v* Colton, 127 U. S. 300.
Patch *v.* White, 117 U. S. 210.

That whether the property passes to the devisee or descends to the heir, as in a case of intestacy must depend upon the intention of the testator, to be gathered from the will and codicil. It is always and necessarily a question of intention. No two wills, probably, were ever written in precisely the same language throughout, nor any two testators die un-

der the same circumstances in relation to their Estates, families and friends. And it would be very unsafe as well as unjust to expound the will of one man, by the construction which a court of justice had given to that of another, merely because similar words were used in particular parts of it.

Bosley *v.* Bosley Exrs., 14 How. 390.

That while there are undoubtedly fixed rules of law in relation to the construction of certain words and phrases in a will, which have been established by a long course of judicial decisions, and which have become landmarks of property, and cannot therefore be disturbed, yet in most of the cases in which they have been applied it is to be feared that they have not accomplished, but defeated, the testator's intention, they owe their origin to the principles of the feudal system, which always favored the heir at law because it was its policy to perpetuate large estates in the same family. The policy and institutions of this country are adverse to the feudal policy of favoring the heir at the expense of the devisee.

Bosley *v.* Bosley's Exrs., 14 How. 390.

That the language of a will *is to be interpreted in subordination to the intention of the testator*, and is not to control that intention when it is clear and determinate.

Burwell *v.* Mandeville's Exrs., 2 How. 56.

That courts have always been astute to find reasons for rescuing a will from the artificial rule established in favor of the heir at law, and will not even be acute in searching for reasons to restore its force where the statute has not abolished it.

King *v.* Ackerman, 2 Black 408.

That the Court ought not, without absolute necessity, let itself embrace the alternative of holding a devise void for uncertainty. Where it is possible to give a meaning, it

should be given, that the will of the testator may be operative; and where two or more meanings are presented for consideration the Court must be well assured that there is no sort of argument in favor of one view rather than another before it rejects the whole. It is true that the heir at law shall only be disinherited by clear intention, but if there be ever so little reason in favor of one construction of a devise rather than any other, we are at least sure that this is nearer the intention of the testator than that the whole should be void any the heir let in.

Adams *v.* Jones, 9 Hare. 485.

Mason *v.* Robinson, 2nd Sim. & St. 295.
Ld. Broughan, 6 Mann. & Gr. 379.

That under the state of the science of law as applicable to the construction of wills, it may well be doubted if any other source of enlightenment in the construction of a will is of as much assistance as the application of natural reason to the language of the instrument.

Giles *v.* Littie, 104 U. S. 291.

That the decision of the question raised by ambiguous expressions *depends upon the intention of the testator as manifested by the words he has used*, and an omission to express his intention cannot be supplied by conjecture; but if a reading of the whole will produces a convictlon that the testator must necessarily have *intended* an interest to be given which is not bequeathed by express and formal words, the Court must supply the defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the *intention* which it is of opinion he has on the whole will sufficiently declared.

Phelps *v.* Phelps, 148 Mass. 470.
Robinson *v.* Asylum, 123 U. S. 702.
Metcalf Farmingham, etc., 128 U. S. 370.

That no man is bound to make a will in such manner as to deserve approbation from the prudent, the wise, or the good. Testators have a right to be eccentric, capricious, arbitrary, and even unjust, and are, moreover, at liberty to conceal circumstances and the motives by which they have been actuated in their dispositions; and a Court should ever be scrupulous to avoid substituting its intention for the intention of the testator, who has a right to say "Thus I wish it; thus I order it; let my will stand for a reason."

Hart *v.* Tulk, 2 D. G. McN. & G. 213.
Bird *v.* Luckie, 8 Hare. 306.
Hilderson *v.* Lowe, 2 Hare. 355.
Winter *v.* Perrette 6 M. & G. 371.

That the introductory clause or preamble, as well as the concluding part of a will are to be considered in order to ascertain the intention of a testator.

Merson *v.* Blackmore, 2 Atk. 341.
Denn *v.* Gaskin, 1 Copp. 657.
Doe *v.* Allen, 8 Danf. & E. 497.
Davis *v.* Miller, 1 Call. 127.
Ibbetson *v.* Buckwith, Cas. Temp. Talbot, 157.
Ferguson's Lessee *v.* Zipp, 4 Wash. (C. C.) 645.
Beale *v.* Holmes, 6 H. & G. 205.
Butler *v.* Little, 3 Me. 239.
Harvey *v.* Olmstead, 1 N. Y. 231.
Jackson *v.* Harris, 8 Jones, 141.
Wheaton *v.* Andress, 23 Wend. 452.
Rupp *v.* Eberly, 79 Pa. St. 141.
Lippitt *v.* Hopkins, 1 Gall. (C. C.) 454.

That the real estate having been directed by the will to be cenverted into money, it is to be regarded for all the purposes of the case as if it were money at the time of the death of the testator.

Cropley *v.* Cooper, 19 Wall. 167.

That a blending of the proceeds of realty and personalty in one fund for the payment of debts and legacies is generally regarded evidence of an intention to give to the proceeds of a sale ordered the character of personalty throughout.

Given *v.* Hilton, 95 U. S. 591.

That the words "bequest," "bequeath," "legacy," may be construed to apply to real estate where the context of the will shows such to be the *intention* of the testator.

Burwell *v.* Mandeville Exrs., 2 How. 560.
Hope *v.* Taylor, 1 Burr. Rep. 716.
Doe *v.* Toefield, 11 East. 246.

That the word "estate" is applicable alike to real and personal property; that the word "bequeath" may be enlarged by the context to mean "give" or "devise."

Shumate *v.* Bailey, 110 Mo. 411.

That it is a general rule that a codicil will change a will only so far as its intent is manifest.

Wetmore *v.* Parker, 52 N. Y. 450.
McCloskey *v.* Reed, 4 Bradf. 234.

From the foregoing there is deduced the following general and controlling principles:

That property originally vested in the individual by occupancy, and was retained and transmitted by the right of might. That there gradually arose a recognition of a right in the individual owner, or custom, to dispose of the title, in which recognition lies the sanction of the will.

That arbitrary rules of disposition which formerly obstructed the right to transmit property have become obsolete.

That two schemes of legal disposition obtain, the will which the law draws up, and the will which the individual

draws up. That the law can only draw up a will for a man when he is imcomptent, has been subjected to fraud or undue influence, has failed to observe the prescribed formalities, has violated public policy or morals, has revoked his will and failed to make a subsequent disposition, has run counter to statutory provisions of proctection to the widow and children, has attempted to create a perpetuity, has conveyed to persons incapable of taking, or has drawn provisions hoplessly vague and uncertain.

That neither children nor next of kin have a vested right in the property of a testator.

That laws of inheritance rest upon the foundation of general utility and public policy.

That neither legislation nor judicial construction can prevent faults of unwise or even cruel wills without creating more mischief and general inconvenience than is sought to be remedied.

From these may be gleaned the broad general principle: that public policy and the good of the Nation require that the greatest testamentary liberty should be accorded to testators, and that our Courts have slowly but steadily blazed the pathway of testamentary liberty so that not capriciousness, nor cruelty, nor vanity, nor deceit, nor harshness, nor injustice, nor gratifying grudges, nor the bestowel of unwise or improvident bounties can defeat a testator's intention.

If we analize the will and codicil in controversy by these principles. indisputably established, and seeking for the intention of the testatrix from the four corners of the whole instrument, we find that it was her intention:

1. To die testate as to all of her property; for the mere fact of her having made a will furnishes in itself a strong presumption that she had such an intention.

2. To ignore the claims of the collateral relatives, except in the event of the declination of the legatees to accept the bequest.

3. To give a conditional life Estate to her granddaughter.

4. To give the entire property in remainder to two charitable organizations, at the decease of the grand daughter, or upon the forfeiture of the condition.

5. To substitute the legatee, Emeline Colville in the place and stead of the legatee, the Home for Incurables.

The testatrix, for reasons satisfactory to herself, and with which a Court construction has absolutely nothing to do, for she might be capricious if she chose and her will must stand for her reason, desired to revoke and did revoke the bequest to the Home for Incurables. The revocation is as follows: "I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York City, in the State of New York, and I hereby give and bequeath the Five Thousand Dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville.

There cannot be even a momentary contention over the statement that in and by the words used by the Testatrix as qouted above there was manifested a clear intention to revoke the bequest to the Home for Incurables and this intention must prevail. Thus we have an intention to revoke and a concurrent intention to bequeath the property included in the revoked clause. One intentian is of as much dignity and force as the other, and both are to be governed by the controlling intention of the testatrix to dispose of her whole property; for the testatrix affords ample proof of her continuing intention to die testate as to all of her property in the codicil itself by the use of the following words: "And I in all other things ratify and affirm my said will." The view that it was the intention of the testatrix to bequeath as a whole what was revoked as a whole receives striking confirmation if we bear in mind what it was the testatrix revoked. It was not "The Five Thousand Dollars," but the bequest." If we reject the words, the "Five Thousand Dollars" as erroneously descriptive and substitute therefore "Bequeath," the codicil would then read: "I hereby revoke

and annul the bequest therein made by me to the Home for Incurables at Fordham New York City, in the State of New York, and I hereby give and bequeath the bequest heretofore in my will bequeathed to said Home for Incurables to my friend Emeline Colville. And I in all other things ratify and affirm my said will."

This construction satisfies the fundamental and universal presumption that the testatrix, in making a will, intended to die testate as to all of her property. It avoids the clumsy, inconvenient, and far-fetched construction that it was only intended by the codicil to give to Emeline Colville five thousand dollars out of the bequest to the Home for Incurables. To maintain such a construction is to claim for the testatrix a work of supererogation, for she was doing a wholly useless thing in revoking the said bequest, a simple bequest in the codicil of five thousand dollars to Emeline Colville would have left the Home for Incurables the residuary legatee.

Of the legal restrictions which could operate against the will of this testatrix, only two can be urged: That a revocation had been made, but no subsequent disposition of the revoked property, or, that its provisions are hopelessly vague and uncertain. Unless one or the other of these two restrictions should be well founded, then the will drawn by the law cannot be permitted to operate.

The controversy then narrows down to the question, did the testatrix make a disposition of her property subsequently to the revocation in the codicil?

Let us assume, for the sake of argument, that the source of the law consisted merely in statutes and in judicial decisions. Then the immense number of reports already in existence, reinforced every year by hundreds of volumes, obviously make it beyond the power of any human intellect to be familiar with them. The law must, therefore, be different to different men, according to the decisions with which they happen to be

familiar. Hence, to every lawyer and judge the law will vary according to his memory, and industry, and to his locality, and the consequent accessibility or inaccessibility of reports.

Our law makes a distinction between principles and the rules of law as established by statute, decision or custom. Rules of law are, from their nature, confined in their operation to classes of cases specifically determined by the express will of the legislator, or by the custom, as the case may be, and cannot be extended to other cases; while on the other hand the principles of the law are principles in the true sense, and are true not only in their explicit statement, but in all their implied logical consequences; hence, also, the corresponding distinction between reasoning from principle and reasoning from authority, the one of which consists merely in applying the established rules of the law to cases coming within their explicit terms, and the other in logical deductions from principles.

The principle of personal liberty or self-ownership being the great fundamental principle of jurisprudence as well applicable to the law of wills as to any other branch of the law, and bearing in mind that the testatrix had an inalienable right to dispose of her whole property as she saw proper, and bearing in mind the further rule that the making of a will is strong presumptive proof of an intention to dispose of her whole property, the Court is not only justified in supplying the needed correction, but bound to do so. It is infinitely more important that the doctrine of testamentary liberty should be maintained than that a disappointed heir in a particular case should be judicially soothed.

It is, therefore, respectfully submitted that the decree of the Court of Appeals of the District of Columbia should be reversed, and that the finding of this Court should be that

the testatrix intended, in and by the codicil to her will, to die testate as to all of her property, and to substitute Emeline Colville in the place and stead of the legatee, the Home for Incurables, thus making her, the said Emeline Colville, the residuary legatee.

Respectfully submitted,

EDWIN SUTHERLAND,

Of Counsel for Appellant, Emeline Colville.

No. 257 & 61.

NOV 4 1898

Supreme Court of the United States.

Sup. Ct. Reporter Thompson for Colville

Filed Nov. 4, 1898.

THE HOME FOR INCURABLES, *Appellant,*

vs.

MARY SPENCER NOBLE *et al.*

No. 61.

EMELINE COLVILLE, *Appellant,*

vs.

THE AMERICAN SECURITY AND TRUST COMPANY.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

SUPPLEMENTAL BRIEF FOR APPELLANT EMELINE COLVILLE.

HENRY THOMPSON,
Of Counsel.

Supreme Court of the United States.

THE HOME FOR INCURABLES, Appellant, *against* MARY SPENCER NOBLE *et als.*, impleaded with EMELINE COLVILLE, Defendant and Appellant.	No. 57.
EMELINE COLVILLE, Appellant, *against* AMERICAN SECURITY AND TRUST COMPANY, Respondent.	No. 61.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT EMELINE COLVILLE.

The testatrix, Mary Eleanor Ruth, made and executed her Will on the first day of June, 1892, and on the same day made and executed a Codicil to her Will. Both papers were duly proved and admitted to probate by the Register of Wills for the District of Columbia.

The Record shows that the will and codicil were made under the following circumstances: Mrs. Ruth was an

aged lady who had only one direct heir of her body and blood living at the time of making the will, to wit, a granddaughter, Sophia Yuengling Huston. Mrs. Ruth had had an only son, to whom she was devotedly attached and who had died shortly before the making of the will. It would seem that Mrs. Ruth had reason to fear that the granddaughter might not long survive, and that in making her will she was actuated by two controlling motives: (1) to provide for her grand-daughter in case the grand-daughter should live; (2) in case of the grand-daughter's death to devote her estate to the perpetuation of the memory of her dearly beloved son. The Will accordingly directed that after debts were paid the entire estate should be turned over to the American Security and Trust Company, in trust, to apply the rents, issues and profits of the entire residuary estate to the support and maintenance of the grand-daughter but in case the grand-daughter should die the trust was to immediately cease and the Security and Trust Company was directed to pay the Hospital of the University of Pennsylvania five thousand dollars, "to be used by the said Hospital to endow and "forever maintain a first-class perpetual bed in said Hos- "pital in the City of Philadelphia, said bed to be in the "name and memory of my beloved son, Melancthon Love "Ruth." (Record, p. 8.)

All the rest, residue and remainder of her estate, after the payment of said five thousand dollars, Mrs. Ruth gave, devised and bequeathed "to the 'Home for Incurables' at Fordham, New York City, in the State of New York, its successors and assigns forever, to be used by said 'Home for Incurables,' to endow and forever maintain one or more beds in said Home," also in the name and memory of her beloved son, Melancthon Love Ruth. (Record, p. 8.)

The contingency, which the testatrix feared, soon hap-

pened: the granddaughter died April 4, 1895, being still an infant. (Record, p. 5.) There was then living no near relative of her own blood to whom the testatrix desired to give a single dollar of her estate. It was all to go to perpetuate the memory of her beloved son. The will being executed, on the same day, the testatrix bethought herself that it was not wise to devote her whole estate to the endowment of beds in hospitals in perpetuation of her son's memory, but that the part given to the Home for Incurables in Fordham, New York, might more properly be given to her intimate friend, Mrs. Emeline Colville, who had been also a friend of her son, and who had shown acts of kindness both to the testatrix and her son during the sickness of both, and in the grief and distress of Mrs. Ruth. She accordingly made a Codicil dated and executed the same day with the Will, in which she "revoked "and annulled the bequest made to the Home for Incur- "ables at Fordham, New York City, in the State of New " York, and gave and bequeathed the five thousand dol- "lars heretofore in my Will bequeathed to the said Home "for Incurables, to my friend Emeline Colville, the "widow of Samuel Colville, now living in New York "City; said bequest being on account of her kindness to "my son and myself during his illness and my distress." (Codicil, Record, p. 9.)

This Codicil contains a plain and manifest error and *mistake in description*, a *falsa demonstratio;* because by the will Mrs. Ruth had given to the Home for Incurables, not "five thousand dollars," but "the residue and remainder of her estate," to endow and maintain one or more beds in name and memory of her beloved son. (Will, Record, p. 8.)

This suit was brought by the executor, the American Security and Trust Company, to obtain a judicial construction of the Will and Codicil, and was tried before

Mr. Justice Coxe of the Supreme Court of the District of Columbia, who made a decree on the 25th day of June, 1890 (Record, page 29), adjudging that the legal effect of the Codicil was "to revoke the legacy of $5,000, given in "and by said Will to the Hospital of the University of "Pennsylvania, and to substitute Mrs. Colville as the "legatee of such sum, but not to revoke the bequest in the "Will in favor of the Home for Incurables." (Decree of Justice Coxe, Record, p. 29.) Upon appeal to the Court of Appeals of the District of Columbia the decree of Mr. Justice Coxe was reversed, with directions to enter a decree in conformity with the opinion of the Court. The prevailing opinion of the Court,—Mr. Chief-Justice Alvey dissenting,—was to the effect that the bequest of $5,000 to the Hospital of the University of Pennsylvania remained intact and unaffected by the Codicil; that the rest, residue and remainder of the estate given to the Home for Incurables at Fordham, in the City of New York, was revoked by the Codicil, and that out of this rest, residue and remainder there was bequeathed to Mrs. Colville $5,000. That the testatrix died intestate as to the residue of the estate, which residue should be distributed to the next of kin in accordance with the statutes of distribution. (Record, p. 44.)

Both Mrs. Colville and the Home for Incurables appealed to this Court, from the Decree entered upon the decision of the Court of Appeals of the District of Columbia, and submit that the Court erred in so construing the Codicil, that it revoked the bequest to the Home for Incurables and gave $5,000 of said bequest to Mrs. Colville, and that Mrs. Ruth died intestate as to the remainder of her residuary estate, and it is claimed on behalf of Mrs. Colville that by the Codicil to Mrs. Ruth's Will made and executed the same day as the Will, the bequest to the Home for Incurables was revoked, and

the said bequest given in its entirety to Mrs. Colville; that Mrs. Ruth died intestate as to no part of her property; that the insertion of the words "five thousand dollars" in the Codicil was surplusage and error of description merely, which might and ought to be disregarded, inasmuch as the Court without those words can clearly determine, by reference to the Will the amount of the bequest to Mrs. Colville; and that the true intent and meaning as well as the expressed intention of Mrs. Ruth in the Codicil was to take away from the Home for Incurables the bequest made to that Institution, and confer the same upon her friend, Mrs. Colville, "because of acts "of kindness to my son and myself during his illness and "my distress."

First Point.

It is quite apparent that the Supreme Court of the District of Columbia erred in holding that the Codicil revoked the bequest to the Hospital of the University of Pennsylvania. Where the testatrix, in terms, revoked the bequest made to the Home for Incurables at Fordham in the City of New York, such revocation will take effect not withstanding an error in the description of the revoked bequest; and manifestly such an error of description cannot be held to revoke a bequest made to the Hospital of the University of Pennsylvania, which is not mentioned in the Codicil containing the revocation. The sole connection or supposed connection of the Hospital of the University of Pennsylvania with the Codicil consists only in fact that the sum of $5,000 is erroneously stated *in the Codicil* to be the bequest to the "Home for Incurables," the same sum being the amount which was bequeathed *in the Will* to the Hospital of the University of Pennsylvania.

Second Point.

It is almost equally apparent that the Court of Appeals of the District of Columbia erred in construing the effect of the Codicil to be, that Mrs. Ruth died intestate as to the residue of her estate, except only as to $5,000 given to Mrs. Colville by the Codicil and $5,000 bequeathed by the will to the Hospital of the University of Pennsylvania. It is beyond dispute from a mere perusal of the Will and Codicil (1) that the testatrix had no intention of dying intestate as to any portion of her estate; (2) that she cared nothing for the collateral relatives not of her immediate blood and kin; (3) that her whole purpose was, after the death of her grand-daughter, to use every dollar of her estate to perpetuate the memory of her son; (4) that she concluded upon reflection the very day of making the Will that her son's memory could be better perpetuated by granting the bequest which she had made to the Home for Incurables in New York City to the friend of herself and her son, Mrs. Colville, who resided in the same city, and accordingly she made the Codicil expressly to carry out that intention; and (5) that the Codicil, while accurately carrying out that intention, contains an erroneous recital or misdescription, which is patent, and correctible by a mere reading of the will, and which if wholly omitted does not vitiate the bequest.

(*a.*) It is to be observed that the Codicil does clearly express that intention: (1) it unequivocally revokes the bequest to the Home for Incurables; (2) with equal exactness it gives that which was bequeathed to the Home for Incurables to Mrs. Colville. If Mrs. Ruth had been content to leave it there, no question could arise, but in the endeavor to be precise and describe what the bequest to the Home for Incurables was she, or more likely the scrivener who drew the Codicil, fell into error and mis-

takenly inserted the words "five thousand dollars" instead of "the residue of my estate."

Those words are surplusage. If the Codicil had revoked the bequest to the Home for Incurables, and had left blank the space wherein she attempts to state the sum bequeathed to the Home for Incurables, and had given "the ——— heretofore in my will bequeathed to said "Home for Incurables to my friend Mrs. Emeline Colville, "the widow of Samuel Colville, now living in New York "City, said bequest being on account of her kindness to "my son and myself during his and my illness and my "distress," the Court would have instantly turned to the Will to see what it was which had been bequeathed to the Home for Incurables, but which was now by the terms of the Codicil bequeathed to Mrs. Colville. The fact that she erroneously stated that this bequest was $5,000 instead of the residue of her estate cannot control against (1) the plain intent of the Codicil itself (2) the plain words of the Will, to which reference is made, for Mrs. Ruth specifically refers to the Will and in every other respect "ratifies and affirms" it. (Record, p. 9.)

(*b.*) The maxims controlling in cases of misdescription in testamentary dispositions of property are: "*Falsa demonstratio non nocet, quum de corpore constat*"; and "*Non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram.*"

"The first rule," says Jarman on Wills (Vol. 2, p. 390, 5th Am. Ed.) "means that where the description is made "up of more than one part, and one part is true but the "other false, there, if the part which is true described the "subject with sufficient legal certainty, the untrue part "will be rejected and will not vitiate the devise." And ALDERSON, *B.*, in *Morrell* v. *Fisher* (4 Exch. 591), says of this rule: "The characteristic of cases within the rule "is that the description, so far as it is false, applies to no

" subject at all, and so far as it is true applies to one " only."

" Misdescription is fatal when total, but when only " partial the inaccurate portion may be disregarded." *Wigram* on Extrinsic Ev., p. 53. The present case comes directly within the rule, and the reason for it.

Mrs. Ruth had indicated, without the insertion of the words " five thousand dollars," by her reference to the Will and by giving to Mrs. Colville the bequest, " heretofore in my Will bequeathed to said Home for Incurables," with accuracy what she desired and intended to give to her friend. It is only when she goes further and attempts needlessly to quote from the Will that she falls into error. Hence the words of the assumed quotation may be erased and expunged and the remaining words fix with certainty the nature and amount of the bequest and the recipient of her bounty. The case is not distinguishable in controlling facts or principle from *Travers* v. *Blundell* (6 Ch. D., 436), where a testator, having under his father's will power to appoint " all ' that part of R.'s estate purchased by me situate at " P., consisting of six specified closes,' appointed all that " part of the property comprised in my late father's Will as " *is therein described as* that part of R.'s estate purchased " by my father situate at P., consisting of ' " *four* closes, and not *six* closes. It was held that all six were well appointed. The reasons given by the Court are, that the appointment was of a certain *corpus* or subject as described by the father's will and representing that description to be in certain specified terms. One of the terms specified differed from the corresponding term of the description actually contained in the father's will, and not being needed for the ascertainment of the subject was rejected as *falsa demonstratio*. In the present case the testatrix in a codicil makes an error in quoting from her own will, dated the same day, instead of the son making it in quoting

from the father's will. In both the error consists in not accurately stating the *corpus* or subject of the devise or bequests in its entirety; but there is sufficient in each instrument, outside of the erroneous description, to fix the precise terms and amount of the gift.

Indeed, it may be taken as the settled doctrine of the English cases, that an erroneous reference in a codicil to the disposition of the will may be disregarded where the intent of the testator is plain.

In *Vaughan* v. *Foakes* (1 Kee., 58), where a testatrix bequeathed the residue of her estate to A, and by a codicil, reciting that gift and that A might die before her, she in that case appointed B and C her residuary legatees, and afterwards the testatrix made a second codicil as follows: "As the death of Mrs. W. (the mother of B and C), has taken place, and as her two children will ultimately become my residuary legatees, the £15 she was to have I give to D." It was held by the Master of the Rolls that the first codicil was not disturbed by the second. "There is a mis-recital," says Lord Langdale, *M. R.*, "of what she had previously "given. She recites that as an absolute gift which is "only a contingent gift. If the word *may* had been "used intead of *will* the recital would have been in exact "conformity with the prior gift."

So also in *Skerratt* vs. *Oakley*, 7 T. R., 492, a testator devised to his wife for life certain leasehold premises at Northwood, and he gave his leasehold estate at Wrentnall and his estate at Northwood, after his wife's death, and the residue of his estate to others. In a codicil executed on the same day he directed that the bequest to his wife in his will should be in full of all her claims on his estate except the estate for life of his "wife and her "assigns in the premises at Wrentnall, anything in the "foregoing will to the contrary notwithstanding." The

widow claimed that she was entitled to the Wrentnall estate under the codicil, it being manifest by the concluding clause that the husband intended to give her something to which she had no right by the will. The Court decided otherwise. Lord Kenyon said that the intention must be collected from the will and codicil taken together, and it was impossible not to see that the word "Wrentnall" was written in the codicil instead of the word "Northwood."

In *Smith* vs. *Fitzgerald*, 3 Ves. & B., 2, a testator bequeathed several legacies to be paid out of the debt owing to him from the Nabob of A, and if any of the legatees died before him he gave their legacies to S, and "after "all the legacies are paid, except those mentioned from "the Nabob's debt, as they may require time, all such "balance as shall remain overplus (exclusive of the "Nabob's *willed to S*) to be equally divided among "the trustees." It was held by Sir W. Grant, *M.R.*, that the residue of the debt not exhausted by the legacies was not given to S by implication. He says, "The "language refers to something as already done, some-"thing that he had given, or supposed he had given "to S. If, in the preceding part there was nothing that "could in any way answer the description of what he here "says he had willed to S, there would then be room for "the application of the doctrine that a declaration by a "testator that he had given something is sufficient evi-"dence of an intention to give it, and amounts to a gift. "But the question here is, whether he did not mean to "describe, however inaccurately, that which he had before "actually given. Without denying that a recital of the gift "as antecedently made may amount to a gift, the Court "ought to see very clearly that there is nothing in the will "to which the recital can refer, before it is turned into a "distinct bequest."

In the present case the language used by the testatrix refers to something as already done; something that she has given in the Will to the Home for Incurables, but which "heretofore in my will bequeathed to the said Home for Incurables," she now desires to confer upon her friend Mrs. Colville. If in the Will there was nothing that could in any way answer the description of what Mrs. Ruth here says she had willed to the Home for Incurables, a gift to Mrs. Colville of that which was heretofore bequeathed to the Home for Incurables might be ineffectual. But the fact is, that the testatrix recites in her Codicil, although inaccurately, that which she had before actually given in the Will, the Court can at once make the necessary correction by a mere inspection of the Will to which the Codicil makes reference; or the misdescription may be wholly omitted; and even then the gift of the residue of the estate to the appellant is incontestable.

Other cases in point are found in the English reports: In *Day* v. *Trig* (1 P. W., 286), where one devised "all his freehold houses in Aldersgate Street, London," having in fact only leasehold houses, it was *held* that the word "freehold" rather should be rejected than the will be wholly void, and that the leasehold houses should pass.

In *Goodtitle d. Radford* v. *Southern* (1 M. & Sel., 299), where a testator devised all his farm called Trogues Farm, situate in the Parish of D., now in the occupation of A. C., the testator had two closes, part of Trogues Farm, but not in the occupation of A. C., and the question was whether those two closes passed by this devise. It was held that the devise comprehended the whole of Trogues Farm, which was a plain and certain description, and was not affected by the defective description of the occupation by A. C.

So also in *Down* v. *Down* (1 G. B. Moo, 80), where A devised all his farm and land, called Colt's Foot Farm, situate in or near the parishes of D. W. and T, *now on*

lease to Mary Fields at the yearly rent of £150, it was held that a close of seven acres, called Williamspring, which was a part of Colt's Foot Farm, but was excepted out of Mary Field's lease, as well as out of a subsequent lease granted by the testator to another person, passed the whole farm consisting, as the case elsewhere shows, of about 172 acres, the Court being of the opinion that it was the intention of the testator to pass the whole of the farm, and not that only which was in the actual occupation of Mary Field.

In *Pacey* v. *Nolls* (8 Vin. Abr., 277), it was held that devise of houses and land lying in the Parish of Billing and in a street called Brook Street, was a good devise of lands in Billing Street, the testator having no land in the Parish of Billing.

(*c*) In our own courts the same rule has been frequently followed in cases of misdescription. In *Patch* v. *White* (117 U. S., 210), the testator devised lot No. 6 in Square 403 in the City of Washington, together with the improvements thereon erected. It was shown that the testator never owned lot No. 6 in Square 403, but did own lot No. 3 in Square 406, and also that lot No. 6 had no improvements on it while lot No. 3 in Square 406 had thereon a dwelling house occupied by the testator's tenants. It was held that under the devise lot 3 in Square 406 passed.

In *Gallagher* v. *Quinlan* (10 Appell. Div. (N. Y.), 402), the testator devised No. 97 Oakland Street, Brooklyn, to plaintiff, but testator never owned any other real estate than No. 79 Oakland Street, Brooklyn. It was held that the devise was effective to convey to the devisee the title to No. 79 Oakland Street, for the reason that there was a sufficient description and designation of the premises devised as the testator's house and lot on Oakland Street, and that the *falsa demonstratio*, to wit, the words and

figures "No. 97" might be eliminated or stricken out as surplusage.

In *Govin* v. *Metz* (79 Hun, 461), the testator devised No. 204 Lexington Avenue. He never owned this, but at the time of making the codicil and at his death he did own No. 736 Lexington Avenue. It was held that the clause should be read as if the misdescription, viz., the figures "204" was not inserted therein, in which case the description would be sufficient to vest in the devisee the property No. 736 Lexington Avenue, the only house which the testator owned on such avenue.

In *Rook* v. *Wilson* (142 Ind., 24), it was held that a will devising "my real estate, to wit, the s. e. ¼ of the "s. e. ¼ of a certain section" will pass title to the n. e. ¼ of the s. e. ¼ of such section; it appearing that the latter land was the only land owned by the testator at the time of his death, and it being admitted that it was the land referred to by the testator as "my real estate."

So, in *Priest* v. *Lackey* (140 Ind.,), there was a devise of "the undivided ½ of all the lands of which I may "die possessed, my land being in the n. . ½ of n. e. frac- "tional ¼ of *section 35.*" All the land owned by the testatrix at the time of making the will lay in Section 36. It was held that the land in Section 36 was devised, because from the will it was clear the testatrix meant to devise the land she owned and should die seized of, and such land was found only in Section 36.

In *Eckford* v. *Eckford* (58 N.W. Rep., 1093), the testatrix in terms devised the s. e. ¼ of a certain section, reciting her ownership thereof, when in fact she did not own such ¼ section, but she did own the s. w. ¼ of the section. *Held*, that as the testatrix evidently intended to devise the land owned by her, the false description would not defeat the devise, since by rejecting it enough remained to lead to an identification of the land.

(*d*) The rule *falsa demonstratio non nocet* applies as well to a bequest as to a devise.

In *Roman Catholic Orphan Asylum* v. *Emmons* (3 Brad., 144), the testatrix bequeathed her stock in the *Mechanics'* Bank, New York City. She had no stock in that bank, but owned stock in the *City* Bank to an amount corresponding to the amount bequeathed. It was held that the City Bank stock passed by the bequest. There was here no ambiguity, but there was a misdescription.

In *Dorr* v. *Geary* (1 Ves. Sen., 255), the testator left to his wife £700 in *East India stock*, having none; but he owned £700 *bank* stock. It was decided by Lord Hardwick that the latter stock should go to the widow, rejecting the words "East India" as a misdescription.

In *Boyer's Estate* (174 Pa. St., 16), the testator bequeathed $10,000 to a trustee, to be invested by him, the income to be paid in equal parts to B and A, and provided that "the five thousand dollars of which A receives the "interest during her natural life," should go after her death to a certain hospital. The sum of $5,000 to be held in trust for A was set apart and invested, with the approval of the Orphans' Court, and at the time of the termination of the life estate amounted to more in value than $5,000. *Held*, that the phrase "the five thousand dollars" referred to the *fund* and not to that *particular sum*, and hence the accretions resulting from an increase in the value of the investment passed with the principal sum to the hospital.

(*e*) That the words "five thousand dollars" are mere matter of recital or description, and that the controlling words in the Codicil are those which revoke the bequest to the Home for Incurables and give to Mrs. Colville "what "was heretofore in my will bequeathed to the said Home "for Incurables" is further indicated by this circumstance: The testatrix did not know, and at the time of making the

will could have no means of knowing, how much of her estate after the death of her grandchild, and the determination of the life estate, would remain in the hands of her executor, the American Security and Trust Company, with which to honor the memory of her deceased son. She believed that it would equal five thousand dollars, and hoped that it might be more, because she gave to the Hospital of the University of Pennsylvania five thousand dollars to endow a bed, and to the Home for Incurables the residue to endow a bed or beds; but suppose the residue had been less than five thousand dollars? It cannot be that, under the terms of the Codicil, Mrs. Colville was to receive five thousand dollars, if, as might well have been the result, when the Trustee came to turn over the property on the determination of the life estate of the granddaughter, there had been less than five thousand dollars of the residue after satisfying the bequest to the Hospital of the University of Pennsylvania. The fact that there is more than five thousand dollars, as shown by the bill of complaint, remaining with the Trustee, has no bearing whatever on the proper construction of the Codicil.

Third Point.

The decree of the Court of Appeals of the District of Columbia should be reversed, and the cause remanded to the Supreme Court with directions to enter a decree that Mrs. Ruth, by her codicil, revoked and annulled the bequest of the residue of her estate to the Home for Incurables in Fordham, and gave said bequest of the residue of her estate to the appellant, Emeline Colville, and that Mrs. Ruth died intestate as to no portion of her estate.

Henry Thompson,
Of Counsel for Appellant Colville.